AUG 4 1972

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-197

JOHN EDWARD WOMACK, Executor and Administrator CTA and NELLIE PAULINE WOMACK ROBERTSON, HORACE H. WOMACK and JOHN EDWARD WOMACK,
Petitioners,

v.

EDNA B. FAIR, J. D. BRIGHT, OVA B. DYKES and ROY BRIGHT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Tennessee

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To the Supreme Court of Tennessee

The petitioner, John Edward Womack, both individually and as Administrator CTA of the wills of Zack T. Bright and Jessie Lee Womack Bright prays that a writ of certiorari issue to revoke the judgment of the Supreme Court of Tennessee entered in the above cause on the 5th day of June, 1972, and petition to rehear overruled July 3, 1972, copy of which appears in Appendix.

OPINIONS BELOW

Since the opinion of the Supreme Court of Tennessee has not as yet been published we file a copy of the same in the Appendix hereto.

JURISDICTION

The jurisdiction of the Court is under U. S. Code, Section 1257. The suit was commenced in the County Court of Knox County, Tennessee, for the probating of the wills of Zack T. Bright and Jessie Lee W. Bright. Mrs. Bright predeceased her husband; however, they had made reciprocal wills and the controversy between the petitioners and respondents is namely, as to who should inherit the estate owned jointly or separately by the two parties. Copies of both wills appear in the Appendix. The parties each had children by previous marriages but none of this marriage; however, the two decedents raised the six children named as parties to the petition. The County Court ruled in favor of petitioners. From this decree an appeal was perfected to the Circuit Court which reversed the County Court and from there on stipulation it went to the Supreme Court of Tennessee. A decree was entered adverse to petitioners as likewise was a petition to rehear dismissed. The question involved is the unconstitutionality of ruling of the Supreme Court of Tennessee as to the application. The learned Supreme Court of Tennessee did not interpret the law as set forth in T.C.A., Sec. 32-306 but attempted to make the law and hence this appeal.

THE QUESTION PRESENTED

The question presented is: Does the Supreme Court of last resort of any state have the right to make the law and overrule the law as set forth by the legislature of the par-

ticular state? If this were true it would do away with the lawmaking parties and leave it entirely to the judicial bodies of the various states.

STATEMENT

As heretofore stated which action commenced in the County Court of Knox County, Tennessee, wherein the petitioner John Womack sought to qualify as the Administrator of the Estates of Zack T. Bright and Jessie Lee Womack Bright. The wills as shown herein as exhibited in the Appendix were reciprocal wills in that they were made at the same time leaving property to the survivor. Mrs. Bright died 18 days previous to the death of Mr. Bright and he did not change his will. Petitioners insist that under the laws of the State of Tennessee, T.C.A., Sec. 32-306 the property passed to them under the will of the beneficiary of the survivor.

The respondents appealed the matter to the Circuit Court where the Circuit Judge disagreed with the County Court decision and reversed the same allowing respondents to receive the benefits of the estate. This was tried upon a stipulation of fact and went directly to the Supreme Court of Tennessee where the judgment of the Circuit Court was affirmed by an opinion filed the 5th day of June, 1972, and a petition to rehear was overruled on the 3rd day of July, 1972.

REASON FOR GRANTING THE WRIT

The decision should be reversed because the learned Supreme Court of Tennessee has not interpreted the law as prescribed by the legislature but has overruled the same and applied its own law to the facts in the case at bar. The decision of the Tennessee Supreme Court likewise violates the constitutional rights of these petitioners in that they are deprived by decree of the Court of their proper rights and have no redress except to appeal to this Honorable Court to review and correct the judgment of the Supreme Court so as to conform to the laws as prescribed by the legislature of the State of Tennessee.

For the convenience of this Honorable Court and to more clearly present the question we quote T.C.A., Sec. 32-306 which is as follows:

> Whenever the devisee or legatee to whom, or any member of a class to which, an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, leaving issue which survives the testator, said issue shall take the estate of interest devised or bequeathed which the devisee or legatee or the member of the class, as the case may be, would have taken, had he survived the testator, unless a different disposition thereof is made or required by the will.

To paraphrase this statute it would appear as follows:

> Whenever the devisee . . . to whom . . . an immediate devise is made dies before the testator . . . leaving issue . . . said issue shall take the estate . . . devised . . . which the devisee . . . would have taken . . . had he survived the testator.

It is our respective position the Supreme Court of Tennessee violated the constitution by disregarding the pro-

vision "said issue **shall** take". There is no conditional wording like the word "may" but it simply says "shall" which we respectfully submit is mandatory and the County Court was correct.

The right of this Honorable Court to entertain this petition has been decided in two leading cases as well as many others. It must be a final decision. Bruce v. Tobin, 38 Supreme Court 7, 245 U. S. 18. The petition will be entertained where it raises an important constitutional question. Burton v. Wilmington Parking Authority, 81 Supreme Court 856, 365 U. S. 17. There are numerous district Court of Appeals decisions following this ruling. Perhaps the latest case is that of Wood v. Conneaut Lake Park, Inc., 88 Supreme Court 1660, 391 U. S. 901.

There appears in the Appendix a copy of the text in 57 AmJur, Sec. 1433 and 1434. Also Sec. 1217 of CJS.

The Tennessee cases applicable to the question presented are: Dickson v. Cooper, 88 Tn 369, to the effect that the law before the passage of the statute was to the effect all devises and legacies lapsed upon the death of the legatee or devisee during the lifetime of the testator. We particularly call Your Honor's attention to the case of Jones v. Hunt, 96 Tn 369 and Handeworker v. Dyermeyer, both of which cases expressly hold that under the statute if the devisee or legatee dies leaving living issue that such passes to the surviving issue. The case of Newman v. Profitt, 59 TnAp 397 recognizes this same doctrine holding that the property passes to the heirs of the son under this section. The subject of wills in 57 AmJur as applicable to the facts in the case at bar appears in the Appendix.

There is a Maryland case interpreting a similar statute, to-wit: Vance v. Johnson, 108 Md. 105. The facts are similar to those in the case at bar and except for the name

of the beneficiary as well as the name of the testator, the wills under consideration are similar.

We regard the subject of this petition as being of national importance since it involves the making of law by the Supreme Court of Tennessee, rather than by the Legislature of the state. Under the Constitution there are three branches of the government, namely; Legislative, Judicial and Executive, Article 1, Sec. 1, which is the Legislative; Article 2, Sec. 1, which is the Executive; and Article 3, Sec. 1, which is the Judicial. The Constitution of Tennessee is to the same effect and the pertinent portions appear in the Appendix.

Tennessee is a common law state as are most of the states east of the Mississippi River. If the law is to be changed it is the duty of the Legislature to do so and unless the members following a mandate of the people see fit to change the same it behooves the Courts to interpret and not to make the law.

In Tennessee the lawyer's "Bible" on the subject of wills and estates is **Pritchard on Wills** and in the Appendix will be found a copy of Sections 442, 449, 889 and 953 of the Third Edition.

We respectfully submit the petitioners' Constitutional rights have been violated in that they have been deprived of their rights in an estate devised to their mother; U. S. Constitution, 5th and 14th Amendments; that the Supreme Court of Tennessee has violated the provisions of the Constitutions of both Tennessee and of the United States and that therefore they are entitled to have this Honorable Court reverse the decision of the Supreme Court of Tennessee.

CONCLUSION

For the foregoing reasons it is respectfully submitted:

1. That this petition for a writ of certiorari should be granted.

2. That the judgment of the Supreme Court of Tennessee should be reversed and the judgment of the County Probate Court should be reinstated and affirmed.

Respectfully submitted

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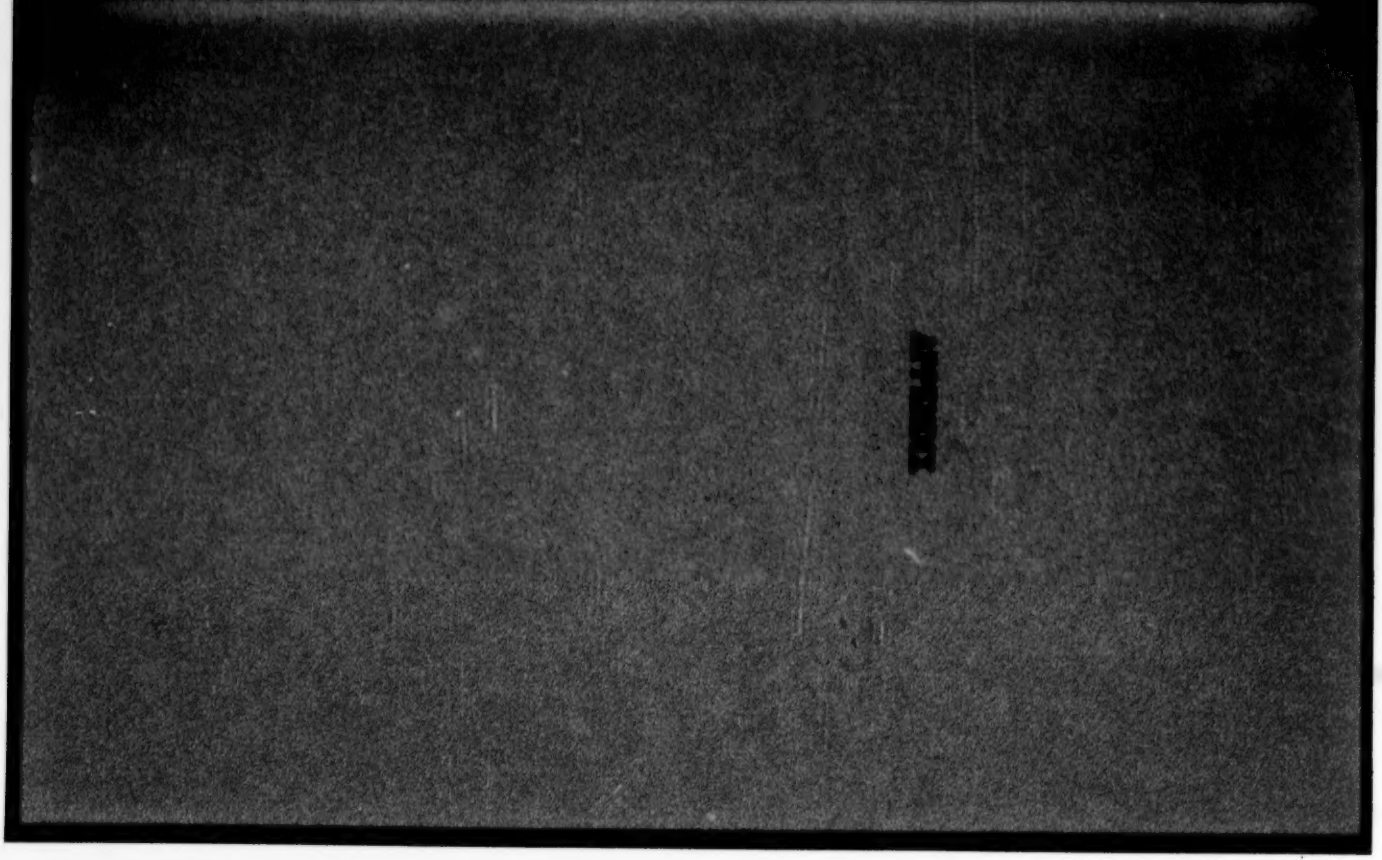
Attorney for Petitioners



APPENDIX A

In Re:
Estate of Zack T. Bright } Knox Law

On Petition to Rehear

(Filed July 3, 1971)

The petition to rehear contains no matter which we did not carefully consider when we decided the case. We believe that our opinion is correct. Therefore, we overrule the petition.

/s/ GEORGE F. McCANLESS
Justice

APPENDIX B

In Re:
Estate of Zack T. Bright } Knox Law

Hon. T. Edward Cole, Judge.

For Heirs of Jack T. Bright: E. Michael Ellis, Knoxville, Tennessee

For Heirs of Jessie Lee Womack Bright: Myron Ray Ely, Knoxville, Tennessee

Opinion

(Filed June 5, 1972)

Jack T. Bright and Jessie Lee Womack Bright were married in February, 1940. Each had been married previously and each had children by the former marriage. They had no children by this marriage.

On July 19, 1952, Mr. and Mrs. Bright executed identical wills each leaving all his property to his respective spouse, and James E. O'Connor and W. A. Carpenter were the attesting witnesses to both wills.

Jessie Lee Womack Bright died on October 15, 1970, leaving three children surviving her. Zack T. Bright died on November 2, 1970, leaving two children and a grandchild surviving him. Neither had changed his will and Zack T. Bright had not been physically capable of changing his will after his wife had died.

John Edward Womack, representing himself and the other children of Jessie Lee Womack Bright, presented to the County Court a petition by which he sought to pro-

bate both wills. He contended that he and those he represented were the beneficiaries of both estates. The children and grandchild of Zack T. Bright answered, denying that the children of Jessie Lee Bright had any interest in either estate and contended that John Edward Womack should not be allowed to probate either will.

The County Judge heard the matter, ordered that both wills be admitted to probate, and appointed John Edward Womack administrator with the will annexed of both estates, conditioned upon his entering into bond in each estate.

The children and grandchild of Zack T. Bright appealed to the Circuit Court which found that the will of Zack T. Bright was mutual and strictly reciprocal with the will of Jessie Lee Womack Bright, that it was the intent of the testators to have only one will take effect, that being the will of the first to die, thus vesting all property in the survivor. The court, therefore, adjudged that the will of Zack T. Bright should not be admitted to probate and that the entire estate of both Jessie Lee Womack Bright and Zack T. Bright passed to the heirs of Zack T. Bright in accordance with the statutes of descent and distribution.

In the Circuit Court the parties stipulated all the facts and the children of Jessie Lee Womack Bright have perfected their appeal in the nature of a writ of error to the Supreme Court.

The heirs of Jessie Lee Bright contend that by reason of the terms of Section 32-306, T.C.A., the property devised and bequeathed to their mother by the will of Zack T. Bright passed to them. That Section is as follows:

> "Whenever the devisee or legatee to whom, or any member of a class to which, an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, leaving issue which survives

the testator, said issue **shall** take the estate or interest devised or bequeathed which the devisee or legatee or the member of the class, as the case may be, would have taken, had he survived the testator, unless a different disposition thereof is made or required by the will."

The Zack T. Bright heirs contend that the two wills were mutual and reciprocal and that the property of Jessie Lee Bright passed to her husband under the terms of her will, and that upon the death of Jessie Lee Bright her will became the only will of the parties and the will of Zack T. Bright thereupon became ineffective.

In **Church of Christ Home for Aged, Inc. v. Nashville Trust Co.**, 184 Tenn. 629, 202 S.W.2d 178 (1947), the court in considering mutual and reciprocal wills, in the words of Mr. Justice A. B. Neil, said:

"While there are many cases holding that a contract to execute mutual wills cannot be determined alone by the contents of the wills, especially where there is no reference in said wills to such a contract, there are cases where the mutual or reciprocal wills in and of themselves furnish ample evidence of such a contract. In **Harris v. Morgan**, 157 Tenn. 140, 7 S.W. (2d) 53, the Court gave due consideration to the contents of four mutual wills as proof of the agreement, as shown by the following comment (at page 154 of 157 Tenn., at page 57 of 7 S.W. (2d)): 'The four wills bearing the same date, each disposing of property to the survivors, and with the direction that such property be divided at the death of the survivor among the same persons, *negative any conclusion but that they were executed pursuant to a joint compact or agreement*, and that each was executed in consideration of the execution of the other three. No parol evidence would, therefore, be necessary to establish the fact of the compact or agreement.' (Italics ours.)

> "Where, as in the instant case, the wills are identical in language, witnessed by the same persons, at the same time and place, and the contracting parties are husband and wife, it is well nigh conclusive that such wills were executed in accordance with their mutual contract to dispose of their property in this manner."

See also **Seat v. Seat**, 172 Tenn. 618, 113 S.W.2d 751 (1937).

In this case, therefore, we are bound by the presumption that exists in such cases that Mr. and Mrs. Bright executed their wills "in accordance with their mutual contract to dispose of their property in this manner."

In **Maurer v. Johansson**, 274 N.W. 99 (1937), the Supreme Court of Iowa said:

> "Mutual wills are those which are executed pursuant to an agreement or compact between two or more persons to dispose of their property in a particular manner, each in consideration of the other. Such wills, if they contain no provisions for third persons, constitute a single will and the will of the first to die, and has no further existence as the will of the survivor."

In this case the court held that the Iowa anti-lapse statute—similar to Section 32-306, T.C.A.—did not operate to raise the presumption that the testator intends his devise to go to the heirs of the devisee in case the devisee predeceases him, unless the will shows a contrary intent.

In **Wilson v. Starbuck**, 182 S.E. 539 (1935), the Supreme Court of West Virginia said:

> "The authorities seem to be in agreement on the proposition that where one party to a contract to

make mutual wills has fully performed the undertaking and has died, the contract is enforceable in equity against the estate of the survivor."

In American Jurisprudence, Wills, Section 737, the following statement appears which we adopt as the applicable law in Tennessee:

"Statutes have been enacted in many jurisdictions designed to prevent, under certain circumstances, the application of the rule that a bequest lapses upon the death of the donee occurring prior to the death of the testator by providing that in such contingency, the heirs or issue of the deceased donee shall take in the absence of testator's intention to the contrary. An important question presented in several cases concerns the application of such a statute in a case involving wills which are reciprocal in their bequests. The question ordinarily arises where the wills are those of husband and wife and one of the spouses has died leaving his entire estate to the other. The question is whether upon the death of the latter, the heirs of the former will take the entire estate under the statute as the heirs of a donee whose death has preceded that of the testator. According to some authorities, mutual wills, that is to say wills executed pursuant to an agreement or compact between the testators by which each testator bequeathed his property to the other, making no provision for a third person either absolute or conditioned upon the death of both testators in a common disaster, constitute in effect a single will, being the will of the first to die, and has no existence as the will of the surviving testator."

The wills of Jessie Lee Bright and of Zack T. Bright were mutual and reciprocal, executed in accordance with

their contract, and the will of Jessie Lee Bright, the first to die, became the only will of the parties.

We affirm the judgment of the Circuit Court.

/s/ GEORGE F. McCANLESS, Justice

Dyer, C. J., Chattin and

Creson, JJ., and Jenkins,

Sp.J., concur.

APPENDIX C

Knoxville, Tennessee

LAST WILL AND TESTAMENT OF ZACK T. BRIGHT

I, Zack T. Bright, of Knoxville, Knox County, Tennessee, being of sound mind and disposing memory, do hereby make this my last Will and Testament, hereby revolking any and all former wills made by me at any time:

First: I direct that upon my death, all of my just and honest debts be paid, including doctors bills, funeral expense, etc. I direct that these be paid from cash on hand or from the first monies coming into my executrix's hands. I further direct that my remains be burried in Bookwalter Cemetary in the lot which I now own and where my monument is already set.

Second: I will, bequeath and devise unto my wife, Jessie L. Bright all of the Real Estate I die possessed of, wheresoever located or situated, to be hers in fee simple, to do with as she deems wise and proper.

Third: I will, bequeath and divise unto my wife Jessie L. Bright, all of the personal property I may die possessed of, in cluding cash on hand, bonds and the proceeds from all of my insurance, said property to be hers, for her sole use and benefit to use as she may desire, with the exception of the payment of just and honest debts for which I may die obligated for, such as doctors bills, hospital, bills, funeral bills, etc.

Fourth: I give, will, bequeath and devise unto my wife, Jessie L. Bright all of the rest and residue of my estate, whether real, personal or mixed, and where-so-ever located or situated, to be hers to do with as she deems wise and proper.

Fifth: I hereby nominate and appoint my wife, Jessie L. Bright as Executrix of this, my last will and testament and direct that she be excused from executing any bond, or from making any reports to any Court.

In witness whereof, in the presence of the witnesses page 2, last will and testament of Zack T. Bright. hereto, I have set my hand on this the 19th day of July, 1952, at Knoxville, Tennessee.

ZACK T. BRIGHT
Testator

Witnesseth:

Signed by the said Zack T. Bright for her last Will and testament in the presence of both of us, the undersigned, who at his request and in his sight and presence, and in the presence of each other, have subscribed our names as attesting witnesses on this the day and year first above written.

/s/ JAMES E. O'CONNOR
Witness
Address: 603 Market Street

/s/ W. A. CARPENTER
Witness
Address: 609 Market Street

Knoxville, Tennessee

LAST WILL AND TESTAMENT
OF JESSIE L. BRIGHT

I, Jessie L. Bright, of Knoxville, Knox County, Tennessee being of sound mind and disposing memory, do hereby make this my Last Will and Testament, hereby revolking any and all former wills made by me at any time:

First: I direct that upon my death, all of my just and honest debts be paid, including doctors bills, funeral expense, etc. I direct that this be paid out of cash on hand or from the first monies coming into my executor's hands. I further direct that my remains be burried in Bookwalter Cemetary in the lot owned by Zack T. Bright, where a monument is already set.

Second: I will, bequeath and devise unto my husband, Zack T. Bright, all of the Real Estate I die possessed of, where-so-ever located or situated, to be his in fee simple, to do with as he deems wise and proper.

Third: I will, bequeath and devise unto my husband, Zack T. Bright, all of the personal property I may die possessed of, including cash on hand, bonds, insurance, etc., to be his, for his sole use and benefit to use as he may desire, with the exception of the payment of doctors bills, hospital bills, funeral bills, etc.

Fourth: I give, will, bequeath and devise unto my husband, Zack T. Bright, all of the rest and residue of my estate, whether Real, personal or mixed, and where-so-ever located or situated, to be his to do with as he deems wise and proper.

Fifth: I hereby nominate and appoint my husband, Zack T. Bright, as Executor of this, my last Will and Testament and direct that he be excused from executing any bond, or from making any reports to any Court.

In Witness Whereof, in the presence of the witnesses Page 2, last will and testament of Jessie L. Bright.
hereto, I have set my hand on this the 17 day of July, 1952, at Knoxville, Tennessee.

JESSIE L. BRIGHT
Testator

Witnesseth:

Signed by the said Jessie L. Bright, for her Last Will and Testament in the presence of both of us, the undersigned, who at her request and in her sight and presence, and in the presence of each other, have subscribed our names as attesting witnesses on this the day and year, first above written.

/s/ JAMES E. O'CONNOR
Witness
Address: 603 Market Street

/s/ W. A. CARPENTER
Witness
Address: 609 Market Street

APPENDIX D

57 AM. JUR.

Sec. 1433 . . . As illustrative of a typical antilapse provision in its entirety, reference may be made to the parent enactment, Sec. 33, of the English Wills Act of 1837, which provided: "Where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Sec. 1434 . . . It may be pointed out in this connection that the opinion has been expressed that the burden of showing facts which take a case out of the application of an antilapse statute is upon the one claiming that the statute does not apply. . . .

* * * * * * *

APPENDIX E

C.J.S. SEC. 1217

Since the operation of the common-law rule as to the lapsing of legacies and devises defeated, in many cases, the intention of the testator, statutes have been enacted in most jurisdiction for the prevention of the lapsing of legacies or devises in case of the death of the beneficiary before the testator, and, under these statutes, the share devised or bequeathed to the pre-deceased devisee or legatee passes to the persons designated by, or entitled to take under, the statute, and the gift does not lapse, . . .

* * * * * * *

APPENDIX F

Art. II

Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Art. III

Section 1. Governor's executive power.—The Supreme Executive power of this State shall be vested in a Governor.

Compiler's Note. This article corresponds with the second article in the Constitution of 1796.

Art. VI

Section 1. Judicial power.—The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace. The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by Justices of the Peace may also be established.

APPENDIX G

PRITCHARD ON WILLS, THIRD EDITION

§ 442. Whether "children," etc., take per stirpes or per capita.

It is often important and sometimes difficult to ascertain from the language of a will whether, under a gift to "children," "grandchildren," "issue," "survivors," and the like, the objects of the testator's bounty take collectively, as a class (*per stirpes*), or severally, as individuals (*per capita*). The English rule of construction, which has been invariably followed in a vast number of cases in Tennessee, presenting almost every possible phase of the question, is that where the gift is of an aggregate sum or entire thing to a body of persons of uncertain existence or indefinite number, as a unit, they take as a class, the share of each being dependent upon the ultimate number of persons entitled to take. The testator is presumed to intend the objects of his bounty to be ascertained at as early a period as possible, so that a devise or bequest to the children, or to the brothers and sisters of A, or of the testator, *simpliciter,* without additional description, means, *prima facie,* the children or brothers and sisters in existence at the testator's death, provided there are such children then in existence. Where the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event, the entire estate vests in such persons only as, at that time, fall within the description of persons constituting such class. Members of the class coming into existence after the death of the testator and before the period of distribution, will take under such devise or bequest equally with those living at the time of his death.

Chapter 13, Public Acts of 1927 provides that the issue of any member of the class dying before the time of distribution takes the share or interest of such decedent unless a clear intention to the contrary is manifested by the will. This statute is not retroactive, but applies only to devises or gifts made subsequent to its passage, that is March 31, 1927.

A devise to testator's widow for life and at her death to "my brothers and sisters, or to their children if any of them be dead and leave children, share and share alike" showed an intention to have a division per stirpes and not per capita.

But the presumption of law is strongly in favor of the vesting of estates *in praesenti*, and yields only to a manifest intention to the contrary to be found in the will. If, therefore, the testator indicate the proportions in which the fund shall be divided, or identify the particular individuals intended, by name or otherwise, they will be held to take *per capita* and not as a class.

* * * * * * *

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§ 449. Death of legatee or devisee before testator.

Whenever a devisee or legatee dies before the testator or is dead at the making of the will, leaving issue who survives the testator, such issue takes the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator, unless a different disposition thereof is made or required by the will. The issue take *per stirpes*, not *per capita*. If the legatee or devisee leave no issue, the legacy or devise lapses, notwithstanding the fact he had disposed of his expectant estate before the death of the testator, and with his knowledge and approval. And where the language of the will manifestly

shows that none but the persons living at the time fixed for distribution shall participate in the gift, the shares of those dying before that period lapse. Effective February 14, 1941 the Tennessee lapsed legacy statute applies to members of a class.

---

§ 889. Exemptions; Class A and Class B beneficiaries.

The statute allows a maximum single exemption of ten thousand dollars against that portion of the estate distributable to Class A beneficiaries and a maximum single exemption of one thousand dollars against that portion of the estate distributable to one or more Class B beneficiaries. If there are both Class A and Class B beneficiaries, a maximum exemption of eleven thousand dollars is allowable, that is, up to ten thousand dollars for property passing to Class A beneficiaries and up to one thousand dollars for property passing to Class B beneficiaries.

Class A beneficiaries are defined as follows: Husband, wife, son, daughter, lineal ancestor or lineal descendant, legally adopted child and lineal descendant of such adopted child.

Class B beneficiaries include any relative, person, association or corporation not specifically designated as Class A.

This classification has been held to be reasonable and constitutional.

Where the testatrix left the bulk of her estate to her husband, who predeceased her and the property passed to his daughter (the step-daughter of testatrix) under the lapsed legacy statute, the step-daughter was held to be a Class B beneficiary.

The Attorney General has ruled the following to be Class B beneficiaries: a common law wife, a divorced

wife, an illegitimate child of a father, a child treated under a will as having been adopted but never legally adopted, and a sister, coupled with oral request that she distribute the property between wife and children of the decedent. A legitimated child is a Class A beneficiary.

Where the testator bequeathed his interest in a partnership to his brother, and the residue of his estate to his widow and son, and the brother renounced his legacy in favor of testator's widow and son, it was held that the entire estate was taxable at Class A rates.

In the case of nonresidents the exemptions are to be apportioned in the ratio that the value of the property taxable in Tennessee bears to the value of all the property that would have been included in the gross estate if the decedent had been a resident of Tennessee. The resulting fraction is then taken of the $10,000 or $1,000, depending on whether the beneficiary falls under Class A or Class B.

If the personal representative erroneously pays the tax at "Class B" rates, when the estate was liable at "Class A" rates, he is liable for the excess tax paid and may be subrogated to the right of the estate to apply for refund.

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§ 053. Specific legacies.

I give and bequeath to my son, Richard Doe, if he survives me, my family Bible and the seventeen jewel Hamilton pocket watch and chain which were given to me by my father.

A specific legacy is a bequest of a particular article or specified part of the testator's estate which is so described and distinguished from all other articles or parts of the same as to be capable of being identified.

The words "if he survives me" may be used in those items of the will where the testator desires to avoid the effect of the "lapsed legacy" statute. Under this statute, whenever the devisee or legatee to whom, or the member of a class to which, an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, leaving issue who survive the testator, said issue shall take the estate or interest devised or bequeathed which the devisee or legatee or the member of the class, as the case may be, would have taken had he survived the testator, unless a different disposition thereof is made or required by the will.